THE PUBLIC LAWYER
JULY 5, 2004

PUBLIC LAWYERS SECTION SEMINAR

AUGUST 18 in RENO, National Judicial College, Room 105
AUGUST 19 in LAS VEGAS, Federal Courthouse

9 a.m.-12.:15 p.m. 3 CLE Hours $75 for Public Lawyers members

In Reno, Maddy Shipman, Washoe County Assistant District Attorney, will review and update current and future planning and zoning issues and cases of interest to public lawyers. If you want to hear what's going on in planning or zoning in Nevada and elsewhere or to throw out questions and ideas for an informed response, Maddy is the attorney to ask.

In Las Vegas, Mary Bochanis, Project Attorney for the Southern Nevada Water Authority, will be discussing alternatives to legislatively restricted bidding processes – specifically, the use of design-build in construction projects. Since design-build has recently become available to all governmental levels, this is the chance to discuss the process with the attorney for over $2 billion of construction projects.

In both Las Vegas and Reno, we will be delving into the maze of electronic records and the public sector. Teri Mark, State Records Manager, James Ellisor, Information Systems Director, Las Vegas Valley Water District, James Taylor, Assistant Counsel, Las Vegas Valley Water District, and Brian Chally, Douglas County Chief Civil Deputy, will present a roundtable discussion on electronic record retention, preservation, and discovery requirements and related questions (*e.g.*, what if electronic records are destroyed?; how much and how difficult is it to store millions of emails?; what should be in your policy?).

Question:

A public employee wishes to convert a fellow employee to his religion. Does he have a First Amendment right to proselytize?

Individuals do not forfeit First Amendment protections when they accept public-sector employment. Public employees also can speak about religious matters in the workplace to a certain degree, particularly if the speech is not communicated to the general public. However, the employer has a right to ensure that the employee's religious speech does not disrupt office work or otherwise become distracting to other employees to the extent that it hinders productivity. Furthermore, no employee has the right to engage in religious harassment or create a hostile work environment. If the fellow employee tells his religious-minded co-worker to stop proselytizing, the co-worker should desist from further conversations on the subject. http://www.firstamendmentcenter.org/religion/publiclife/faqs.aspx?id=2139

"The most formidable weapon against errors of any kind is reason."
Thomas Paine - 1776

Keeping a Conviction Secure

by Lisa Kreeger and Danielle Weiss
http://www.ndaa-apri.org/publications/newsletters/silent_witness_volume_8_number_2_2003.html

"It's a great feeling for a prosecutor to know that another dangerous criminal has been convicted, and even better to know the conviction will stick. Post-conviction, a prosecutor may fear that opposing counsel's performance will be characterized, mistakenly or inaccurately, as "ineffective assistance." Even worse is a fear that an unclear record will not expose the defendant's self-serving misrepresentation of his attorney's work. What can the prosecutor do to prevent such mischaracterization? The shortest answer is to create a comprehensive record that clearly reflects the facts, the available defenses, the subsequent strategies and both attorneys' pretrial and trial conduct. This issue of The Silent Witness will suggest pretrial discovery and trial practices that can assist prosecutors in creating records sufficiently strong to survive appellate scrutiny.

The *Strickland* Standard

When the courts are determining whether a trial attorney provided adequate counsel, they presume competency—that sound trial strategy and tactics motivated the attorney's actions. The controlling case, Strickland v. Washington, 466 U.S. 668 (1984), sets forth a two-prong test, placing the burden upon the defendant to show that (1) defense counsel provided deficient representation and that (2) the deficiency was prejudicial. Deficiency in these cases is determined, from the record, using an objective standard of reasonableness under the prevailing professional norms.1 The prosecutor's goal is to have the record reflect that the defense was reasonable, albeit unsuccessful.

Potential Challenges

Some common challenges in post-conviction cases involving DNA evidence are as follows:

1. The DNA technology was unavailable at the time of the trial;
2. The outcome of the trial may have been different with DNA testing of the evidence because identity was the issue;

3. The requested testing has the scientific potential to produce new, non-cumulative evidence, materially relevant to the person's assertion of actual innocence;

4. The state failed to produce evidence, not discoverable through due diligence, that is potentially exculpatory;

5. The probability exists that the person would not have been prosecuted or convicted if DNA testing had been done; and/or

6. The request for testing is not to cause unreasonable delay in the administration of justice.

Traditional forms of discovery pleadings can refute some of these claims, for example, whether the technology was available, or whether potentially exculpatory evidence was disclosed. Other claims (e.g., DNA evidence may have produced a different outcome in the case of an identity defense, or that DNA evidence would have been relevant to the defendant's claim of actual innocence) can be refuted with a record made through prosecutorial thoughtfulness and aggressive effort in both pretrial discovery and trial.

Creating a Record

How does a prosecutor create a sufficient record? Here are some suggestions:

Pre-Trial Strategies

*Request that the lab include in every report a statement regarding the availability of remaining sample for retesting (or the occasional lack thereof). In the prosecutor's initial discovery response, the facts that a sample remains, available for defense retesting, will be known.

*As early as reasonable, advise your analyst to remind the defense counsel of remaining sample at each and every opportunity.

*After reviewing the issues surrounding the DNA evidence and the role it will play in the case, consider whether it is prudent for the defense to request appointment of an expert to assist defense counsel, without objection by the prosecution.

*If the prosecution will not present DNA evidence, then say so clearly in a pre-trial pleading. DNA results and/or the name of the forensic analyst who performed the tests should be disclosed regardless.

*In letter or in pleading form, specifically invite the defense counsel to retest the DNA evidence if identity of the defendant is in issue. File the invitation in the court file. As early as reasonable, and on the record, ask the judge to confirm that the defense counsel is not asking to retest the evidence by way of a recorded inquiry.

*Ask the judge to ask the defendant (not his lawyer) about his decision to go to trial without retesting the evidence.

Trial Strategies:

*In the case-in-chief, establish identity with every form of available evidence, including direct testimony, direct physical evidence and circumstantial evidence. Make sure that the proof reflects that DNA was merely one of several sources of identity evidence.

*During cross-examination of the prosecution analyst, identify the defense "issues" with the DNA evidence—law enforcement collection, contamination of the sample, interpretation of the statistics—and respond with detailed redirect testimony of the government's analyst to explain why retesting would not be a remedy.

*Whenever possible, in cross-examination of the defendant or defense witnesses, elicit a concession that identity is not in issue.

*When the defense is not identity, but rather consent or the justified use of force, discuss these defenses in argument for judgment

of acquittal or in closing.

*Conversely, when identity is the issue, discuss all of the evidence that proves identity in argument for judgment of acquittal or in closing.

Post-Conviction Strategy:

*In any post-conviction pleading, deposition or hearing, focus on the reasonableness of the defense attorney's decisions in light of the facts, the evidence supporting the defendant's identification, and the absence of controversy about the validity of the DNA.

Relevant Cases

Before dismissing any of the aforementioned strategies, consider the following cases:

In Leonard v. Michigan, 256 F. Supp. 723 (West. Dist. Mich., 2003), a rape case, the prosecutor had disclosed the DNA analyst's name and report during discovery and the initial defense attorney had received services from a defense expert before withdrawing from the case. The subsequent defense attorney did not use the expert as a consultant or witness. According to the Michigan appellate court, defense trial counsel (without expert assistance) did not adequately demonstrate proficiency with the evidence or the purpose in not refuting the DNA evidence.

In Duff v. Tennessee, 2002 Tenn. Crim. App. Lexis 977 (Knox. Ct. App., 2002), another rape case similar to the facts in Leonard, defense counsel failed to call a rebuttal expert serologist. In Duff, though, the prosecutor preserved the decision-making that surrounded the defense attorney's choice to rely upon a favorable ruling regarding permissible argument, rather than delay the case for the defense to obtain a serologist. The prosecutor had two identifications made by the victim, one photographic and the other voice-identification in a live line-up. The trial judge expressly ruled that the defense attorney could argue the "absence of or negative evidence inference" — that the state had no DNA evidence that linked the defendant to the rape. The court found no error in the defense attorney's strategic decision to proceed in trial without calling another DNA analyst as a defense witness.

Lastly, a description of a record that reflects the propriety of defense counsel's decisions and reasonableness of the defense strategy is found in Chaney v. Missouri, 73 S.W. 3d 843 (Mo. App., 2002). In Chaney, the parties never tested biological material from underneath the victim's fingernails. The court awarded the defendant a hearing on his challenge that his attorney should have had the fingernail scrapings tested. Although the pre-trial record was not developed, during the post-conviction hearing the defense attorneys articulated a "pro and con" analysis of asking for the material to be tested and their conclusion not to make the request of the court. The Missouri appellate court found no error in the defense attorney's strategy.

Conclusion

These tips can be summarized as follows:

*make the defense attorney aware of remaining evidence sample;

*force a decision, entered into the record, about re-testing so there will be discussions about strategies and defenses;

*use all available evidence to prove the defendant's identity;

*identify clearly the raised defense; and,

*if genuinely necessary, support the defense counsel's request for preparation assistance.

NEVADA CASES

http://www.leg.state.nv.us/scd/OpinionListPage.cfm

Bailey v. State, 120 Nev. Adv. Op. 46 (June 15, 2004). "Appellant Daniel Bailey contends his conviction for lewdness with a child under the age of fourteen is barred because the charge was brought after the running of the applicable statute of limitations. Bailey asserts the complaint or information was not filed within three years of the discovery of the offense as provided by NRS 171.095(1)(a). We disagree and conclude that NRS 171.095(1)(b) is the applicable statute because lewdness with a minor is an offense constituting sexual abuse of a child under NRS 432B.100. Accordingly, where child victims discover or reasonably should have discovered they were the victims of sexual abuse, an information or complaint may be filed any time before the child victim of the abuse reaches the age of twenty-one. Because the victim in the instant case was under twenty-one when the complaint was filed, the offense was not barred by the statute of limitations and Bailey's conviction is affirmed."

Ebeling v. State, 120 Nev. Adv. Op 45 (June 15, 2004). "Appellant Gregg E. Ebeling was convicted of multiple counts arising from sexual acts involving five minor victims. Ebeling contends that his convictions for sexual assault and lewdness with a minor under the age of fourteen arising from one instance of anal penetration are redundant and the lewdness conviction must be reversed. Ebeling also asserts that only one conviction can result from a single act of indecent exposure regardless of the number of persons who viewed the act.

We conclude that a defendant cannot be convicted of both sexual assault and lewdness with a minor under the age of fourteen when those convictions involve a single act. We also conclude that NRS 201.220 allows for only one charge of indecent exposure, regardless of the number of victims. Therefore, we vacate one conviction of lewdness with a minor under the age of fourteen and one conviction of indecent exposure. We remand this case to the district court for resentencing in accordance with this opinion."

Government & Public Sector Lawyers Division

http://www.abanet.org/govpub/background.html

Debate on Rule 1.11 Changes Heats Up

By David Caylor and Jim Feroli

In its most recent report, the Commission on Evaluation of the Rules of Professional Conduct (formerly Ethics 2000) proposed changes to Model Rule 1.11 that may significantly affect the way government lawyers do business. The proposal would make representation by a former government lawyer subject to essentially the same rules that apply to a private lawyer who is transferring to another firm. The proposed changes would place greater restrictions on lawyers who engage in private practice after leaving public service.

Under the current rule, a lawyer who leaves government service is prohibited from representing a private client in connection with a matter in which the lawyer participated personally and substantially as a public servant. The new language would make government attorneys subject to similar limitations placed on private practitioners by Model Rule 1.9. Rule 1.9 prohibits an attorney who has represented a client in one matter from representing another client in the same or substantially related matter. The proposed rule changes would preserve the Rule 1.11 definition of "matter," but expand the reach of the rule by applying the "substantially related" standard from Rule 1.9. The new language thus would increase the number of instances in which former government attorneys would be prohibited from representing clients as

private practitioners.

After a presentation by members of the Commission, the issue was roundly discussed at the Government and Public Sector Lawyers Division Council meeting at the ABA's Midyear Meeting in San Diego. Some council members questioned the impetus for the rule change. They were concerned that the initiative reflected a solution in search of a problem. No trend of abuse or of government lawyers engaging in conflicts of interest has been cited as a reason for support of the rule change.

Another concern raised was the potential negative effect the rule changes could have on the ability of the government to recruit new lawyers. Thomas Morgan, professor of law at George Washington University, observed the following in written testimony to the Commission: "[t]ake a career lawyer hired by the EPA to prosecute clean water violations in Colorado. The special problems of pollution in that state will become the experience the lawyer develops, soon virtually the only thing the lawyer knows how to deal with well. When the lawyer leaves the EPA to work for a law firm, most of the lawyer's likely clients will take positions contrary to that of the EPA." Under the proposed rule changes, that lawyer may run afoul of Rule 1.11. In addition, historically there has been a beneficial exchange of attorneys and information between the public and private sector, and the proposed changes may inhibit that exchange.

Morgan's testimony also noted the proposal's potential for uncertainty. Referring to the case of In re Sofaer, 728 A.2d 625 (D.C. 1999), he stated, "[w]hat is clear from Sofaer, however, is that it makes a real difference to lawyers whether they can have the relative security of knowing that 'matter' means 'a particular matter involving a specific party or parties' or whether the lawyer must, as Judge Taft said in another setting, 'set sail on a sea of doubt' under the 'substantially related' test."

Yet another concern is whether the proposed changes take into consideration the differences between clients in the public and private sector. The federal government, as a client, has exercised its power to limit conflicts of interest through the enactment of laws that makes most such activity illegal. 18 USC § 207, the federal conflicts of interest statute governing employees who leave public service, prohibits government attorneys only from engaging in the same matters in which they were substantially involved in as public lawyers. The proposed rule changes, in going beyond that limitation, would raise questions as to the precedential impact of such changes on the application of 18 USC § 207 and other federal and state prohibitions. For example, would courts refer to proposed Model Rule 1.11 in determining the scope of a particular matter as applied in 18 USC § 207?

Lastly, Morgan criticized a second set of proposed changes to Model Rule 1.11, intended to make representation of multiple government agencies a conflicts issue and prohibit the use of one agency's "secrets" to assist a second agency of the same government. His written testimony stated that the changes have not been requested by governments, governments are fully capable of asserting their own protections, and that such changes may in fact get in the way of good government by limiting the assignment of lawyers.

The debate on the proposed changes to Model Rule 1.11 is ongoing. The Division will play an active role in the decision-making process and welcomes the comments and input of its members on this important issue.

This article appeared in the Division's newsletter, PASS IT ON, Vol. 10, No. 3, Spring 2001. Jim Feroli was the Division's Project Coordinator. David Caylor is the Division's Ethics Committee Chair and the City Attorney of Irving, Texas.

Reflections of a Former Prosecutor

by Nathan A. Fishbach

http://www.wisbar.org/wislawmag/2003/09/career.html

In 1993, after serving in the U.S. Attorney's Office for more than 13 years, I left government service to join Whyte Hirschboeck Dudek S.C. In the years since I made the switch, I am frequently asked which sector I prefer - the public or the private. My usual response is a punt. I state that I have three sons and love them equally, but for different reasons.

The reality is that the differences between the two offices are much less than you would imagine. In both places, you litigate matters, using the same rules of procedure and evidence, relying upon the same skill sets, and frequently appearing before the same judges. In each office, you work with a great group of professionals who enjoy what they are doing. And regardless of the sector, you have the same sleepless nights, worrying about obtaining a favorable result.

Of course, in private practice, you have to prepare daily time sheets. But this is really not that much different than the government. For in the public sector, to organize a heavy caseload, you have to keep track of what you are doing - and so you might prepare a semblance of a time sheet on a regular basis.

Having an Impact at an Early Age

Without a doubt, my service in the government was invaluable. As a new Department of Justice attorney, even with all of the magnificent training programs and seminars, you learn to "sink or swim" rather quickly. Perhaps it is an exaggeration, but a former colleague told me that he believed that in your first year of working for the government, you obtain a decade's worth of experience. For example, as a 28-year-old federal prosecutor, I argued before the U.S. Court of Appeals for the Seventh Circuit that a political corruption conviction should be affirmed and was the author of the government's appellate brief. (And typical of the chronic support staff shortages in the public sector, I also probably typed, copied, and bound the brief.) In private practice, it is rare that an attorney can obtain this type of opportunity so early in a career.

What a great experience the government offers to its attorneys - and what an impact an attorney can have, even at a young age. In the biography of prominent defense attorney Edward Bennett Williams, it was noted that when Williams met with government lawyers to discuss possible criminal charges against a client, he always paid close attention to the reaction of the youngest prosecutor in the room. Williams believed that this was the individual who would prepare the prosecution memorandum - either recommending or declining the issuance of charges - that would become "the bible" of the case as it proceeded through the Department of Justice's approval process. How true that is.

In looking back over my government years, I am struck by the awesome responsibility that public lawyers have. You are not just representing an individual or a corporation. Rather, you are representing "the people." The decision that you make in one case will have an impact upon the determinations that will be made in other cases with similar factual settings, many of which are not before you. For that matter, your decision will have an impact upon the resolution of cases in which the underlying events have not even occurred - that is, the crime has not been committed yet.

Moreover, you have the added burden of ensuring that your decision is consistent with the conclusions reached by your colleagues in other cases. In essence, in every litigative decision, you are making public policy. Even in deciding

to take no action (such as in declining to prosecute a case), you are taking a position on the government's behalf.

The Public Lawyer's Mission

As a public lawyer, your first task is not in strategizing how to reach the desired result. Rather, the initial step is deciding what the appropriate result should be. And this determination is one that is constantly evaluated and reevaluated throughout the litigative process. The importance of making the appropriate determination was brought home to me when then U.S. Attorney (now U.S. District Judge) J.P. Stadtmueller presented to each of his new assistants a plaque bearing Justice Sutherland's eloquent statement in Berger v. United States that the government attorney does not represent "an ordinary party to a controversy, but ... a sovereignty whose obligation to govern impartially is as compelling as to govern at all." The quote goes on to state that the government's interest in a prosecution is "not that it shall win a case but that justice shall be done." What a great way to capture the public lawyer's mission.

As a government attorney, I always took great pride in the fact that the individuals with whom I worked - attorneys, special agents, and agency administrators - always spoke about doing "the right thing." At the time, I thought that my feeling might simply be hubris - after all, these were my colleagues with whom I worked on a daily basis. However, in the decade since I left the government, I interact regularly with many of these same individuals and others like them from the other side of the table. And, not surprisingly, I have found that they really are striving to reach the appropriate result.

As I become older, I attend retirement parties for my former colleagues on an ongoing basis. These parties bring together people who are currently serving in the government with those who have previously served. Sometimes, the attendees span almost three generations of public service. Invariably, these are emotional affairs, and even the most hardened special agent might cry. I think that the emotion comes from the fact that the individuals know that they have something in common. They have all worked tirelessly in pursuing the same shared mission of doing "the right thing" on the public's behalf.

For that, they should have pride.

There are four kinds of homicide: felonious, excusable, justifiable and praiseworthy, but it makes no great difference to the person slain whether he fell by one kind or another -- the classification is for advantage of the lawyers.
-- Ambrose Bierce, The Devil's Dictionary

Average Brain Weights (in grams)

Species	Species Weight (g)
adult human	1,300 - 1,400
newborn human	350 - 400
sperm whale	7,800
fin whale	6,930
elephant	6,000
humpback whale	4,675
gray whale	4,317
killer whale	5,620
bowhead whale	2,738
pilot whale	2,670
bottle-nosed dolphin	1,500 - 1,600
walrus	1,020 - 1,126
Pithecanthropus Man	850 - 1,000
camel	762
giraffe	680
hippopotamus	582
leopard seal	542
horse	532
polar bear	498
gorilla	465 - 540
cow	425-458
chimpanzee	420

http://faculty.washington.edu/chudler/facts.html#brain

NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at http://www.ca9.uscourts.gov/ca9/neopinions.nsf)

Hamilton v. Newland, No. 02-15972 (9th Cir. July 1, 2004). "Courts have struggled with the issue of when a Rule 60(b) motion brought by a habeas petitioner should be treated as a second or successive petition. Three schools of thought have emerged: some courts have decided that Rule 60(b) motions are never second or successive petitions; others have decided that they always are; and still others have taken a moderate approach that proceeds with a case by case examination of the relief sought in the Rule 60(b) motion. Because the Ninth Circuit has previously observed there should be no bright line rule that every 60(b) motion in a habeas corpus case is treated as a second or successive habeas petition, we are among those courts that have taken the moderate approach.

We conclude that in this case the district court should have treated Hamilton's motion solely as a 60(b)(6) motion and not as a second or successive petition under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). We nevertheless affirm the district court's order denying relief because, under traditional 60(b) analysis, Hamilton could not show any "extraordinary circumstance" necessary to qualify for 60(b)(6) relief."

Safe Air for Everyone v. Meyer, No. 02-35751 (9th Cir. July 1, 2004). "We consider whether grass residue remaining after a Kentucky bluegrass harvest is "solid waste" within the meaning of the Resource Conservation and Recovery Act . Safe Air for Everyone appeals the district court's dismissal of its complaint for injunctive relief under RCRA.

We conclude that the district court erred in dismissing the case on jurisdictional grounds. However, because we determine that Safe Air has failed to demonstrate that a genuine issue of material fact exists as to whether grass residue is 'solid waste' under RCRA, we affirm the judgment of the district court."

Schwarzennegger v. Fred Martin Motor Co., No. 02-56937 (9th Cir. June 30, 2004). "Arnold Schwarzenegger, an internationally-known movie star and, currently, the Governor of California, appeals the district court's dismissal of his suit against Fred Martin Motor Company, an Ohio car dealership, for lack of personal jurisdiction. Fred Martin had run a series of five fullpage color advertisements in the Akron Beacon Journal, a locally-circulated Ohio newspaper. Each advertisement included a small photograph of Schwarzenegger, portrayed as the 'Terminator,' without his permission. Schwarzenegger brought suit in California, alleging, inter alia, that these unauthorized uses of his image infringed his right of publicity. We affirm the district court's dismissal for lack of personal jurisdiction.'

United States v. Crowell, No. 03-30041 (9th Cir. June 30, 2004). "This case presents the question whether a person convicted of a crime may collaterally attack her conviction by moving to expunge the records of her conviction. We hold that she cannot, and we affirm the judgment of the district court."

Lounsbury v. Thompson, No. 02-35863 (9th Cir. June 29, 2004). "Michael Lounsbury appeals the denial of his habeas petition, which alleges substantive and procedural errors affecting the determination of his competency to stand trial.

Because the error in declaring a procedural default kept the district court from deciding Lounsbury's substantive competency claim, however, we remand this case to the district court to give it the opportunity to decide whether the state court denied Lounsbury due process in finding him competent to stand trial."

Boyd v. Benton County, No. 02-35776 (9th Cir. June 28, 2004). "Kristianne Boyd brought suit under 42 U.S.C. § 1983 against members of the Corvallis Police Department and the City of Corvallis and members of the Benton County SWAT Team and Benton County for violation of her Fourth Amendment rights during the execution of a search warrant.

Specifically, Boyd argues that the use of a 'flash-bang' device constituted excessive force under the circumstances. The flash-bang grenade is a light/sound diversionary device designed to emit a brilliant light and loud noise upon detonation. Its purpose is to stun, disorient, and temporarily blind its targets, creating a window of time in which police officers can safely enter and secure a potentially dangerous area. On summary judgment, the district court found that all individual defendants were entitled to qualified immunity and that Boyd's Monell1 claim against the City of Corvallis failed for lack of evidence. On appeal, Boyd challenges the district court's findings as to both qualified immunity and her Monell claim. Defendants cross-appeal, arguing that the district court should have granted qualified immunity on alternative grounds. We conclude that the district court properly found a material issue of fact as to whether Boyd's Fourth Amendment rights were violated, and properly determined that these rights were not clearly established at the time of the injury. We also conclude that Boyd's Monell claim was properly denied on summary judgment. We therefore affirm the district court."

"Here, viewing the facts in the light most favorable to Boyd, the officers' use of force was constitutionally excessive. The officers had information leading them to believe that up to eight people could be sleeping within the apartment. Without considering alternatives such as a controlled evacuation followed by a search, the officers (according to Boyd) deployed the explosive flash-bang device — which the officers knew had the potential to cause injury — in the room without looking or warning the occupants. The officers had reason to believe that the Hispanic suspect and a gun could be in the apartment, and that there was a loft on the premises. But this cannot have reasonably caused the officers to believe that it was appropriate to toss, without either looking or sounding a warning, an explosive, incendiary weapon into an apartment where it was believed that there were up to eight people, most of whom were unconnected to the robbery and many of whom were likely asleep."

Chein v. Shumsky, No. 01-56320 (9th Cir. June 25, 2004). "Dr. Edmund Chein was an expert medical witness in an automobile accident trial in California state court. He was also involved in a suit with a former business associate concerning the distribution of fees paid by patients. In both lawsuits he provided evidence — in the first instance trial testimony, in the second an interrogatory answer — that was misleading, at the least, concerning his medical credentials. At the instigation of the trial judge in the personal injury trial, he was charged in California state court with four counts of perjury and convicted of three. This habeas case raises various questions concerning the propriety of his conviction, of which we address only one. Before plunging into the details of this perjury case, it is worth recalling 'the traditional Anglo-American judgment that a prosecution for

perjury is not the sole, or even the primary, safeguard against errant testimony.' Bronston v. United States, 409 U.S. 352, 360 (1973).These cautions apply with particular force to expert witnesses such as Chein. Although paid, usually well, for their efforts, such witnesses generally appear because they freely choose to do so, often with considerable immunity from subpoena. Unless the strict requirements governing perjury convictions developed by the common law and applied by California are carefully applied, the willingness of experts to assist factfinders with the specialized knowledge needed to decide many cases may atrophy.

As will appear, Chein undoubtedly did calculate the answers for which he was convicted in the hope that he would succeed in misleading the jury in the personal injury case and the opposing lawyer in the monetary dispute case. But, on careful review of the record, we conclude that no reasonable jury could have concluded that all the elements of the crime of perjury were made out, and therefore reverse the denial of the habeas petition."

United States v. Kellum, No. 02-50555 (9th Cir. June 24, 2004). "This appeal presents us with a question of first impression: May a defendant charged under two separate indictments that are later grouped together for sentencing receive a downward adjustment for acceptance of responsibility when he pleaded guilty to the charges in one indictment, but went to trial on the charges in the other indictment? The district court concluded that such a defendant was eligible for a two-level acceptance of responsibility adjustment, the government appeals, and we affirm."

South Oregon Barter Fair v. Jackson County, Oregon, No. 02-35560 (9th Cir. June 24, 2004). "The Southern Oregon Barter Fair is a nonprofit corporation that held an annual fair in Oregon between 1978 and 1996.The Fair describes its event as a religious gathering, a 'harvest celebration and gathering of . . . "new age," "back-to-theland" hippies and friends,' and a 'counterculture crafts fair' where artisans and vendors set up booths for people to buy crafts. In order to hold several previous events, most recently the 1996 event, the Fair had to obtain a permit from Jackson County, Oregon, under the Oregon Mass Gathering Act, OR. REV. STAT. §§ 433.735-.770, 433.990(6) (2001). This appeal presents the question whether, as the Fair contends, the Act is facially unconstitutional under the First Amendment."

"In sum, we uphold the challenged provisions of the Act as consistent with the First Amendment."

Medina v. Hornung, No. 02-56484 (9th Cir. June 23, 2004). "Alex Medina (Medina) appeals the district court's denial of his habeas petition. Medina was convicted by a jury in California state court of assault with a deadly weapon (Cal. Penal Code §245(a)(1)) and felony hit-and-run (Cal. Vehicle Code § 20001). Medina's habeas petition challenges certain allegedly prejudicial ex parte statements made by the trial judge to the jury in violation of his constitutional rights to counsel and to be present during trial. The California Court of Appeal found constitutional error but denied relief on harmless error grounds. We have jurisdiction pursuant to 28 U.S.C. § 2253.

Because the state court's denial of Medina's appeal was neither contrary to, nor an unreasonable application of, clearly established federal law, we affirm the district court's denial of Medina's habeas petition. Further, we take this opportunity to explain that, for the purpose of the 'unreasonable application' clause of 28 U.S.C. § 2254(d)(1), if a state court disposes of a constitutional error as harmless using an

appropriate standard of review, federal courts must examine that disposition for objective unreasonableness without reference to the harmless error test set forth in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Only if the state court's harmless error analysis amounts to an unreasonable application of clearly established federal law do we apply the harmless error standard set forth in Brecht to see whether a habeas petitioner may still be denied relief."

United States v. Ross, No. 02-50226 (9th Cir. June 21, 2004). "Defendant Ricky D. Ross was convicted of drug trafficking offenses in 1996. After his first appeal and extensive postremand proceedings, he now appeals from the district court's denial of his motions to dismiss the indictment or order a new trial, arguing that government misconduct prejudiced his entrapment defense. He also appeals from the district court's post-remand sentencing order, alleging several errors. We affirm the district court's denial of his motions because he was not prejudiced by the government's behavior, including its failure to disclose that a key informant was rewarded with illegally-obtained permanent resident status. We also affirm the sentencing order as a proper exercise of the district court's discretion."

United States v. Crawford, No. 01-50633 (9th Cir. June 21, 2004). "Defendant Raphyal Crawford appeals the district court's denial of his motion to suppress a statement that he made to law enforcement officers, arguing that the statement was taken in violation of his Fourth Amendment protection against unreasonable searches and seizures and in violation of his entitlement to Miranda warnings under the Fifth Amendment. Defendant also appeals the district court's imposition of atwo-level sentence enhancement for physical restraint of a victim during the commission of the offense. We affirm Defendant's convictions, but vacate his sentence and remand for resentencing."

Tuscon Women's Clinic v. Eden, No. 02-17375(9th Cir. June 18, 2004). "Plaintiffs in this case are physicians who provide abortions in their private medical practices in Arizona. They challenge the constitutionality of a statutory and regulatory scheme which requires the licensing and regulation of any medical facility in which five or more first trimester abortions in any month or any second or third trimester abortions are performed.

The district court granted summary judgment in part to plaintiffs, and in part to defendants. We affirm in part, reverse in part, and remand for further proceedings on plaintiffs' claim that the scheme poses an undue burden on the right to abortion."

RUI One Corp. v. City of Berkley, No. 02-15762 (9th Cir. June 16, 2004). "We must decide whether Berkeley's Living Wage Ordinance, Berkeley Ordinance No. 6548-N.S. (2000) (creating Berkeley Municipal Code ch. 13.27), amended by Berkeley Ordinance No. 6583-N.S. (2000), violates the Contract Clause of the United States Constitution, the Equal Protection Clause of the United States and California Constitutions, or the state and federal Due Process Clauses as an impermissible delegation of legislative power to unions.

Reviewing the constitutionality of the local ordinance de novo, we hold that Berkeley's Living Wage Ordinance, as amended, survives these constitutional challenges. Accordingly, we affirm the decision of the district court denying RUI One Corporation's summary judgment motion and entering judgment in favor of the City of Berkeley."

Congregation Etz Chaim v.City of Los Angeles,

No. 02-56487 (9th Cir. June 18, 2004). "The controlling question in this case is whether Appellant the City of Los Angeles may revoke a building permit issued to Appellee Congregation Etz Chaim authorizing renovations to a home owned by the Congregation and used as a place of worship. Because we agree with the district court that Congregation was entitled to rely on issuance of the building permit by the City, we AFFIRM the district court's order lifting the stop-work order issued by the City."

Port of Stockton v. Western Bulk Carriers KS, No. 02-16221 (9th Cir. June 15, 2004). "We must decide whether a party who failed properly to seek attorneys' fees in one action may bring a separate claim for them in another."

"Yet the Port simply failed to include a request for attorneys' fees in any cost bill it may have filed in the original contract case.1 Neither did the Port take any other action that conceivably could stay the entry of that judgment. Indeed, it failed even to appeal the original denial of its motion to amend its pleadings to include a claim for attorneys' fees. By failing to file an appropriate motion within the relevant time limit, to say nothing of failing to appeal from the underlying judgment, the Port waived any claim to attorneys' fees arising out of the original litigation, and therefore cannot recover them in this new action."

United States v. Wright, No. 03-30142 (9th Cir. June 15, 2004). "Defendant James Wright appeals his 15-year sentence for the production of material involving the sexual exploitation of his 11-month old son. His wife Tracey Wright appeals her 20-year sentence for the possession and receipt of material involving the sexual exploitation of children. They both challenge the district court's 4-level upward departure under U.S.S.G. § 5K2.8 for extreme conduct. They also challenge the district court's application of the 2-level vulnerable victim adjustment, U.S.S.G. § 3A1.1. Tracey Wright separately claims that the court improperly used her relevant conduct — which includes the production of images of her husband engaging in sexually explicit conduct with their 3-year old son, a 17-month old girl, a 3-year old girl, and a 13-year old girl — to apply U.S.S.G. § 2G2.2(c)'s cross-reference to U.S.S.G. § 2G2.1. We hold that the district court did not err in calculating the Wrights' sentences."

United States v. Cuang, No. 03-50067 (9th Cir. June 14, 2004). "Peter Cunag entered a conditional guilty plea to the charge of possessing stolen mail, reserving the right to appeal the denial of his pre-trial motion to suppress evidence. In that motion, Cunag sought to suppress stolen mail seized by police officers from a hotel room which Cunag had procured by registering under a false name, using a dead woman's credit card, and providing admittedly forged authorization and identification documents. The record contains ample and compelling evidence that Cunag was not lawfully present in the hotel room because he procured it through fraud. Thus, we hold that Cunag had no legitimate expectation of privacy in the room, and we affirm the district court's denial of his motion to suppress the evidence."

Kennedy v. Lockyer, No. 01-55246 (9th Cir. June 14, 2004). "Robert Kennedy was tried twice on a charge of selling 0.08 grams of a substance in lieu of a controlled narcotic drug — a substance that looked like an illegal drug but wasn't — to an undercover police officer for $20. The first trial ended in a hung jury: four jurors favored finding Kennedy not guilty; eight jurors thought him guilty. Prior to his second trial, Kennedy twice asked the state court to provide him with a complete transcript of the

earlier proceeding. It refused to do so. Instead, it granted him only the portion of the transcript that contained the witnesses' testimony and denied him the portion that contained the parties' motions and the court's rulings thereon, as well as the court's instructions and the parties' opening statements and closing arguments.

At the second trial, Kennedy was represented by a new attorney who proceeded without the aid of a complete transcript of the prior trial. Aware that the new attorney did not have the full transcript, the state introduced evidence intended to show gang involvement on Kennedy's part — evidence that had been excluded from the first trial after a successful
pre-trial motion to suppress. This time, after a one day trial and three days of deliberations, the jury returned a guilty verdict. Because Kennedy had two prior serious or violent offenses, he was sentenced for the $20 sale of a non-drug toa prison term of twenty-five years to life, pursuant to California's Three Strikes Law, Cal. Penal Code §§ 667(e) and 1170.12(c)(2) (2003).

Kennedy appeals the district court's dismissal of his habeas corpus petition. He argues that his Fourteenth Amendment right to due process and equal protection was violated when the state court denied his request for the full transcript of his first trial. Because the state court's decision was contrary to clearly established Supreme Court law, we reverse the district court and direct it to grant Kennedy's habeas petition."

Leavitt v. Arave, No. 01-99008 (9th Cir. June 14, 2004). "Richard A. Leavitt, a State of Idaho prisoner under sentence of death, brought a petition for habeas corpus in the district court. 28 U.S.C. § 2254. He filed a myriad of attacks on his conviction and sentence, ranging from alleged evidentiary errors through instructional errors and onto attacks on the Idaho death penalty scheme. He also asserted ineffective assistance of counsel. The district court granted habeas corpus relief on one claim: the assertion that a burden of proof instruction violated Leavitt's due process rights. However, it denied relief as to all of his other claims.

The State of Idaho appeals the former, and Leavitt appeals the latter. We reverse as to the former, affirm as to all of the latter, with the exception of an ineffective assistance of counsel claim, and remand for further procedings."

They're paid enough to take the heat

By Robin Miller

http://63.192.157.117/specials/Salary/2003/

It used to frustrate me. Now I'm merely amused.

Every year when The Reporter begins to put together its annual survey of public management pay, the complaining begins. It seems many of the subjects in this survey aren't keen on the idea of the taxpaying public knowing exactly how much they earn.

I've heard all kinds of grumbling. My favorite is when one of the subjects of the survey points out that we never publish our own salaries - implying, of course, that this somehow would make things even and "not so biased."

First of all, we don't work for a public agency. Our funds are not derived by taxes. In private business, if you don't produce, your business goes under and you don't get paid. In the public sector, they just raise our taxes and keep on going.

Secondly, I always figured it would be too depressing for the reading masses out there to know that you could more than triple my salary and I still wouldn't make the "$150,000 Club."

One manager lamented recently that the salary survey was too focused on how much top public officials are paid and didn't pay enough attention to all the hard work they do.

Me thinks he doth protest too much. Simply pointing out in detail what a public official is paid is not in and of itself a proclamation that it's too much (or too little, in the case of those at the bottom of the list). We're simply printing the public figures. It is up to you, the taxpaying reader, to decide if you think it's too much or too little.

And for the record, we have, through the years, done numerous stories comparing the workload and pay of top public managers to what top managers in private industry make. In almost every case, executives in the private sector made more.

Another subject of the annual survey cried foul because we list those who make base salaries of $150,000 or more per year as part of the "$150,000 Club." The word "club," it seems, doesn't sit well.

Really, he's breaking my heart.

The median income in Solano County is $54,099, according to U.S. Census figures. If you are a person who makes $150,000 or more in base salary (and that's not even counting all the other compensation perks), then you are part of an exclusive group of individuals in this community. That's a club, like it or not.

Besides, for that kind of cash, the rest of the world could call me anything they want. Of course, after today's survey, many of the featured managers probably already are.

The author is city editor at The Reporter.

Today's Word:

JEREMIAD \jair-uh-MY-uhd\, noun:

A tale of sorrow, disappointment, or complaint; a doleful story; also, a dolorous or angry tirade.

Johnson's jeremiad against what he sees as American imperialism and militarism exhaustively catalogs decades of U.S. military misdeeds

--Stan Crock, review of The Sorrows of Empire, by Chalmers Johnson, Business Week, February 2, 2004

Today's Word:

TRENCHANT \TREN-chunt\, adjective:

1. Characterized by or full of force and vigor; as, "a trenchant analysis."
2. Caustic; biting; severe; as, "trenchant criticism."
3. Distinct; clear-cut; clearly or sharply defined.

The trenchant divisions between right and wrong, honest and dishonest, respectable and the reverse, had left so little scope for the unforseen.

--Edith Wharton, The Age of Innocence